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**In the**

# Supreme Court of the United States

JOSEPH and ALICE MORRISON,

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Did the Court of Appeals err by failing to assess whether jurisdiction under the Clean Water Act extends to Petitioners' property in light of this Court's decision in *Rapanos v. United States*?

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## I

## THE DECISION BELOW COMPORTS WITH NEITHER THE *RAPANOS* PLURALITY'S NOR THE CONCURRENCE'S JURISDICTIONAL TEST

The government contends that, because the Sixth Circuit affirmed the district court's finding that Petitioners' property is "adjacent" to the St. Clair, a navigable-in-fact waterway, the assertion of Clean Water Act jurisdiction over Petitioners' property is proper under the test set forth in Justice Kennedy's concurring opinion in *Rapanos*. But the government's position ignores Petitioners' principal contention that pre-*Rapanos* adjacency is not coterminous with post-*Rapanos* adjacency. Although the relevant terms of art may be the same, their content, in light of *Rapanos*, has changed considerably. Therefore, vacature and remand is required to allow the lower court to apply the proper jurisdictional standard.

Relying heavily upon Justice Kennedy's comment that the Army Corps of Engineers can make the categorical judgment that all wetlands "adjacent" to navigable-in-fact waterways bear the requisite "significant nexus" to those same waterways, the government concludes that jurisdiction extends to Petitioners' property because their wetlands are "adjacent" to the St. Clair.

The government's reasoning is faulty. Justice Kennedy's opinion, when it asserts that adjacency is sufficient to establish jurisdiction, clearly bases that conclusion on the adjacency found sufficient to support jurisdiction in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). *See Rapanos v. United States*, 126 S. Ct. 2208, 2248 (2006) (Kennedy, J., concurring in the judgment) ("As applied to wetlands adjacent to navigable-in-fact waters, the Corps' conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by

showing adjacency alone."). In *Riverside Bayview*, jurisdiction was predicated upon the inability to ascertain with ease where the water ended and the wetland began. *See Riverside Bayview*, 474 U.S. at 134; *see also Rapanos*, 126 S. Ct. at 2225-26 (plurality opinion). It is for that reason that Justice Kennedy, in his *Rapanos* concurrence, concluded that the Corps can reasonably make the categorical determination that all such wetlands bear a significant nexus to navigable-in-fact waterways.

But that circumstance is not present here. As the record clearly demonstrates, Petitioners' property is distinguishable from the St. Clair. *See, e.g.*, App. at L-1, L-2 (Petitioners' property on highway "M-154 behind a Mobil Gas Station on Harsens Island"); L-6; L-8 (showing property bounded by highway and canal); L-9 (same). Arguably, Petitioners' property is adjacent to a canal, which eventually empties into the St. Clair. But there has never been a finding that the canal is itself navigable-in-fact. *Cf.* App. at L-7 (determining that Petitioners' property is a "Wetland Adjacent to Section 10 Water Tributary to Navigable Water"). Therefore, the present record *at most* supports the contention that Petitioners' property is adjacent to a nonnavigable tributary of a navigable-in-fact waterway. But under Justice Kennedy's concurrence, jurisdiction over such wetlands must be "establish[ed] [by] a significant nexus on a case-by-case basis." *See Rapanos*, 126 S. Ct. at 2249 (Kennedy, J., concurring in the judgment).

Thus, when the Sixth Circuit stated that Petitioners' property is "adjacent" to the St. Clair, it meant that the property bears a hydrological connection to the St. Clair. But this Court in *Rapanos* rejected the hydrological connection rule. Further, the instant record is devoid of any material to support a significant nexus finding. And nowhere does the government contend that under the plurality test, jurisdiction would obtain. Therefore, vacature and remand are necessary to allow the

lower court to apply the proper jurisdictional test in light of *Rapanos*.[1]

## II

## THE PLURALITY IS THE CONTROLLING *RAPANOS* OPINION

Where no opinion of the Court obtains a majority of the justices' votes, the holding of the Court is expressed by that opinion joined in by the Members who concurred in the judgment on the narrowest grounds, *see Marks v. United States*, 430 U.S. 188, 193 (1977), provided that the opinion comprising the "narrowest grounds" is a logical subset of the remaining opinions agreeing with the Court's judgment. *See United States v. Johnson*, 467 F.3d 56, 64 (1st Cir. 2006). The government argues that neither the plurality opinion nor the concurrence of Justice Kennedy is a logical subset of the other, and that therefore it is necessary to review the position taken by the dissenting justices. The government also contends that even if the *Marks* rule were to apply, the "narrowest grounds" would be those of Justice Kennedy's concurrence.

The government is wrong on each of these points. The plurality opinion is both the "narrowest grounds" for the decision and the logical subset of Justice Kennedy's test, such that, under *Marks*, the plurality is the controlling opinion. And even if *Marks* were inapplicable, that result would still obtain. The views of dissenting justices ought to have *no* role in

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[1] The government's contention that, merely because Petitioners notified the Sixth Circuit of this Court's decision in *Rapanos* pending the consideration of their petition for rehearing, review by this Court is unmerited. But the Sixth Circuit's summary denial of the rehearing petition, ostensibly on the grounds set forth in the original panel decision, confirms either that (1) the Sixth Circuit ignored *Rapanos*, or (2) the Sixth Circuit fundamentally misunderstood the change in the law effected by *Rapanos*. Both errors call upon this Court's supervisory and remedial review.

ascertaining the holding of the Court. The Court operates through judgments, and produces precedent by explaining its judgments in written opinions. The views of dissenting justices, because they play no part in the judgment of the Court, cannot determine the Court's holding; they are the functional equivalent of advisory opinions.[2]

**A. The *Rapanos* Plurality Is the Logical Subset**

Under the *Rapanos* plurality, Clean Water Act jurisdiction extends to nonnavigable tributaries that contain a relatively permanent or continuous surface connection and that are traditionally denominated as streams, rivers, lakes, and the like. *Rapanos*, 126 S. Ct. at 2225 (plurality opinion). According to Justice Kennedy, the Corps has jurisdiction over nonnavigable tributaries that bear a significant nexus to navigable waters, that nexus being established where the nonnavigable tributary significantly affects the chemical, physical, and biological integrity of downstream navigable waters. *Id.* at 2248 (Kennedy, J., concurring in the judgment).

In comparing the plurality's test with his, Justice Kennedy intimated that the plurality would find jurisdiction in instances where he would not. *See id.* at 2246. But Justice Kennedy's opinion represents just that—an opinion—and nothing more as to the potential scope of the plurality's test. Clearly, the plurality considered Justice Kennedy's test to be the broader of the two. *See id.* at 2235 n.15 (plurality opinion). Moreover, Justice Stevens expressly noted that it would be an "unlikely event that the plurality's test is met but Justice Kennedy's is

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[2] William J. Brennan, Jr., *In Defense of Dissents*, 37 Hastings L.J. 427, 428 (1986) (noting that dissents do not make law). One is reminded of Justice Potter's remark, recorded by Justice Brennan, that dissents are "subversive literature." *Id.* at 429.

not." *Id.* at 2265 n.14 (Stevens, J., dissenting).[3] For purposes of applying the *Marks* rule, then, it is fair to conclude that a flow substantial enough and located within a defined channel so as to qualify under the plurality test as a water of the United States also will qualify as such under Justice Kennedy's test, whereas wetlands that are near to navigable waters yet not hydrologically connected to them, although conceivably jurisdictional under Justice Kennedy's test, *see Rapanos*, 126 S. Ct. at 2251-52 (Kennedy, J., concurring in the judgment), are assuredly beyond jurisdiction under the plurality test, *see id.* at 2226-27 (plurality opinion). Therefore, the plurality test is a logical subset of Justice Kennedy's test.

### B. The *Rapanos* Plurality Is the "Narrowest Grounds" Under *Marks*

To qualify as the binding rationale of the Court under *Marks*, the *Rapanos* plurality opinion must constitute the "narrowest grounds" of those Members concurring in the judgment. The government, assuming *arguendo* that the plurality opinion is more restrictive of Clean Water Act jurisdiction than Justice Kennedy's opinion, nevertheless concludes that the latter is the narrowest ground because "it would reflect the narrowest disagreement with the judgment below and with the approach advocated by the four dissenters." Resp. at 13 n.5. The government's position is in error. The narrowest ground under *Marks* is that rationale which would most narrowly support the judgment of *this* Court, not the lower court, and which would garner the five votes of those in the majority. The plurality both supports the judgment in *Rapanos and*, as the logical jurisdictional subset of Justice Kennedy's

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[3] Petitioners cite to Justice Stevens' dissent simply to establish the reasonableness of Petitioners' position that the jurisdictional reach of the plurality's test is narrower than that of Justice Kennedy's, and not for the purpose of establishing a holding of the Court.

test, garners five votes. Therefore, the plurality opinion constitutes the "narrowest grounds" under *Marks*.

### C. The *Rapanos* Dissenting Opinions Have No Effect on the Holding of the Court

In *Rapanos*, five Members of the Court voted to reverse the judgment of the Court of Appeals. Four Members dissented from that disposition. Justice Stevens, writing for all four dissenters, offered his opinion that as a result of the fractured majority, Clean Water Act jurisdiction can be proved under either Justice Scalia's or Justice Kennedy's test. Relying upon that statement, the government here contends that the views of the dissenters should inform the Court's *Marks* analysis, reasoning that the jurisdictional test announced in Justice Kennedy's concurrence is legally binding because it would receive the votes of five justices (Justice Kennedy and the four dissenters).

The government's position is jurisprudentially flawed. The federal judiciary, precluded by Article III from issuing advisory opinions, *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792), makes law through the decision of actual cases, and by providing, normally in written form, the reasons for those decisions. In other words, the only constitutionally permissible manner for federal courts to exercise the judicial power of Article III is through judgments in cases or controversies; but where a justice has had no role in contributing to the decision of a case or controversy, that justice's view perforce cannot enjoy the authority of Article III. The views of dissenting justices are no different, jurisprudentially speaking, than the views of justices who were not present at conference and took no part in the decision, or for that matter the views of justices expressed in nonjudicial settings, and often reflect little more

than the dissenters' "unadulterated cussedness."[4] V.H. Roberts, *Dissenting Opinions*, 39 Am. L. Rev. 23, 30 (1905).

The cases cited by the government do not require otherwise. In *League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594 (2006), although the Court discussed the opinions of concurring and dissenting justices, *see id.* at 2607, that discussion was intended to show that the Court in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), did not hold that all Equal Protection challenges to political gerrymandering are nonjusticiable. Yet that conclusion would follow under *Marks* without recourse to the dissenting opinions in *Vieth*. The *Vieth* plurality would have found all such challenges to be nonjusticiable, *see id.* at 306 (plurality opinion), whereas Justice Kennedy would not categorically foreclose the possibility of judicial challenge, *see id.* (Kennedy, J., concurring in the judgment).

In *Alexander v. Sandoval*, 532 U.S. 275 (2001), the Court cited various opinions in *Guardians Association v. Civil Service Commission of City of New York*, 463 U.S. 582 (1983), for the proposition that Section 601 of Title VI of the 1964 Civil Rights Act forbids only intentional discrimination, and that Section 602 of the same permits disparate impact. *See Alexander*, 532 U.S. at 281-82. But no party contested those propositions in *Alexander*, *see id.* at 280, 282, and thus the Court was not presented with the jurisprudential question here of whether dissenting opinions can be a constitutional

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[4] Of course, this is not to imply that dissents lack value in every respect. Members of this Court have ably argued otherwise. *See, e.g.*, Brennan, *supra*; William O. Douglas, *The Dissent: A Safeguard of Democracy*, 32 J. Am. Jud. Soc'y 104 (1948); Harlan Fiske Stone, *Dissenting Opinions Are Not Without Value*, 26 J. Am. Jud. Soc'y 78 (1942). But whether dissents have intrinsic worth is a question obviously distinct from the constitutional issue of whether they enjoy the force of law.

conduit for the exercise of the Article III judicial power. And in *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995), also relied upon by the government, the Court simply referred to a dissenting opinion, *see id.* at 285, whose views the *Wilton* Court did not ultimately accept, *see id.* at 289-90. The remaining authority relied upon by the government for its *Marks* theory is not binding on this Court. *See* Resp. at 11-12 (citing to a concurrence of Justice Souter and decision of the First Circuit).

But the government's attempt to support its position that dissenting opinions can inform the Court's *Marks* analysis is flawed for a more significant reason. This Court is infallible because it is final. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result). Therefore, even when it appears to rely upon a dissenting opinion to guide its decision, that reliance is if anything a de facto reversal of the correlative majority opinion. Although stare decisis and adherence to precedent is the norm for the Court, *see Harris v. United States*, 536 U.S. 545, 556-57 (2002) (plurality opinion), that policy is not without exception, *see Arizona v. Rumsey*, 467 U.S. 203, 212 (1984); hence, use of dissenting opinions by this Court at most proves an inconsequential divergence of form. In contrast, for inferior federal courts to rely upon dissenting opinions of this Court presupposes the power of reversal which by definition they do not have.

Regardless of the outcome of a *Marks* analysis, the Court should not allow the views of the dissenting justices in *Rapanos* to affect its determination of the controlling legal standard for Clean Water Act jurisdiction.

## III

## THE APPEAL AND PETITION PRESENT "EXCEPTIONAL CIRCUMSTANCES" UNDER FEDERAL RULE OF CIVIL PROCEDURE 60(b)

The government erroneously here contends that Petitioners have not met their burden for relief from final judgment under Federal Rule of Civil Procedure 60(b). Because the Sixth Circuit would have had no reason to reach the merits of their appeal had Petitioners not met the standards for relief under Rule 60(b), the fact that the Court of Appeal *did* address the merits without mention of the Rule 60(b) standard demonstrates that the court impliedly found that burden to have been met. Moreover, Petitioners have shown "exceptional circumstances" meriting relief given the substantial change in the scope of Clean Water Act jurisdiction effected by the Court's decision in *Rapanos*,[5] and the paramount necessity to have the Sixth Circuit apply the correct jurisdictional standard to this and all future cases.

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[5] *Cf. Am. Econ. Ins. Co. v. Reboans, Inc.*, 900 F. Supp. 1246, 1250-51 (N.D. Cal. 1994) (reconsideration appropriate where intervening change in law) (citing *Sch. Dist. 1J, Multnomah County, Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993)).

## CONCLUSION

For these reasons the petition should be granted.

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Respectfully submitted,

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